

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:SB:1:BOS:TL-N-5703-00

JRMikalchus

date:

to: Chief, Appeals, New England

from: Associate Area Counsel (SB/SE), Area 1, Boston

subject: Request for Advice regarding Interest Abatement Claim

Re: [REDACTED]

SSN: [REDACTED]

This serves as a follow-up to our advice dated September 8, 2000, in which we responded to an e-mail from Timothy J. Powell on August 24, 2000 requesting our advice. Subsequent factual development has caused us to modify our original advice.

DISCLOSURE

This document may include confidential information subject to the attorney-client and deliberative process privileges, and may also have been prepared in anticipation of litigation. This document should not be disclosed to anyone outside the Service, including the taxpayers involved, and its use within the Service should be limited to those with a need to review the document in relation to the subject matter or the case discussed herein. This document also is tax information of the instant taxpayers which is subject to I.R.C. § 6103.

ISSUE

How should Appeals handle an oral request for abatement of interest which was followed by numerous written requests for abatement?

CONCLUSION

A notice of final determination should be issued since the taxpayer's oral request for interest abatement was followed up in writing and is therefore treated as a valid informal claim.

FACTS

The taxpayer orally requested that the revenue officer assigned to her case abate the interest accruing after [REDACTED] for the [REDACTED], [REDACTED], and [REDACTED] tax years. The request was then forwarded by the revenue officer to the Problem Resolution Office, which then forwarded the request to the office of Pennsylvania District Counsel in Philadelphia, since that office had handled the Tax Court cases involving [REDACTED]. The District Counsel office in Philadelphia then issued an opinion with regard to [REDACTED]'s request and the Interest Abatement Coordinator in the New England District was assigned the case.

It is clear from the administrative file that the taxpayer's claim for interest abatement, while it may have been made orally initially to the revenue officer, was subsequently repeated several times in writing. A letter dated [REDACTED] from the taxpayer's attorney to the revenue officer explained the request for abatement. A follow-up letter dated [REDACTED] to the Problem Resolution Office also reiterated the request. Yet another follow-up letter occurred on [REDACTED] to the Interest Abatement Coordinator. A fourth explanation of the taxpayer's position was transmitted to Appeals Officer Powell on [REDACTED]. Thus, while it is clear that the taxpayer never filed a formal claim for abatement on Form 843, the taxpayer placed her request in writing well within the statute of limitations for receiving a refund of the interest that she paid, in the amount of \$ [REDACTED], on [REDACTED].

ANALYSIS

Under I.R.C. § 6404(e)(1), as in effect for the tax years at issue,¹ respondent is authorized to abate all or any portion of an assessment of interest on any payment of income tax to the extent that any error or delay in such payment is attributable to an officer or employee of respondent being erroneous or dilatory in performing a ministerial act. Treas. Reg. § 301.6404-2

¹ I.R.C. § 6404(e) was amended by the Taxpayer Bill of Rights 2 (TBOR 2), Pub. L. 104-168 § 301, 110 Stat. 1452 (1996). The amendments have expanded the authorization for abatement of interest from ministerial acts to "ministerial or managerial" acts. The word "unreasonable" was also added before the words "error or delay." These amendments to I.R.C. § 6404(e) are effective for tax years beginning after July 30, 1996 and, accordingly, are not applicable to this case. See Krugman v. Commissioner, 112 T.C. No. 16, fn.7 (filed April 28, 1999).

provides that a ministerial act is a procedural or mechanical act that does not involve the exercise of judgment or discretion. The error or delay in payment shall be taken into account only if no significant aspect of such error or delay can be attributed to the taxpayer involved, and after the Internal Revenue Service has contacted the taxpayer in writing with respect to such payment. I.R.C. § 6404(e)(1)(B). In enacting this statute, Congress did not intend that the abatement of interest provision "be used routinely to avoid payment of interest." Rather, Congress intended abatement of interest to be used in instances "where failure to abate interest would be widely perceived as grossly unfair." H.R. Rep. No. 426, 99th Cong., 1st Sess. 844 (1985); S. Rep. No. 313, 99th Cong., 2d Sess. 208 (1986).

Treas. Reg. § 301.6404-1(c) states that:

Except in case of income, estate, or gift tax, if more than the correct amount of tax, interest, additional amount, addition to the tax, or assessable penalty is assessed but not paid to the district director, the person against whom the assessment is made may file a claim for abatement of such overassessment. Each claim for abatement under this section shall be made on Form 843.

Thus, the language of this regulation is unequivocal: the taxpayer must file Form 843 to formally request abatement of interest.

In the present case, the taxpayer filed a written claim for abatement on [REDACTED]. We can find no case law addressing whether the requirement of Treas. Reg. § 301.6404-1(c) that such a claim be filed on Form 843 must be met before a notice of final determination can be properly issued. Once issued, this notice would then allow the taxpayer to petition the Tax Court pursuant to I.R.C. § 6404(i). We turn, however, to the analogous situation of a taxpayer who is seeking a refund of income taxes.

By statute, a taxpayer cannot begin a suit against the Service "for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected . . . until a claim for refund or credit has been duly filed with the Secretary." I.R.C. § 7422(a). There is, moreover, a limitations period on filing a refund claim, which also applies to interest abatement claims: such a claim must be filed "within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later." I.R.C. § 6511(a).

Although the Treasury Regulations require a formal procedure for making a timely refund claim, "it has long been recognized that an informal claim for refund will suffice" to vest a court with jurisdiction. D'Amelio v. United States, 679 F.2d 313, 315 (3d Cir. 1982). The Third Circuit has held that communication sufficient to establish an informal claim exists if the communication (1) occurs through a written instrument, (2) informs the Service that the taxpayer believes that he has been subjected to an erroneous or illegal tax exaction, and (3) states that the taxpayer desires a refund or credit. Id.; see also United States v. Kales, 314 U.S. 186, 195 (1941) (finding an informal claim sufficient to establish subject matter jurisdiction where the taxpayer provided written notice that left the government with "no doubt that [it] was setting forth [its] right to a refund" in the event that a known contingency occurred); Miller v. United States, 949 F.2d 708, 711 (4th Cir. 1991) (informal claim must contain written component, must be sufficient to put the Service on notice that a tax refund is sought, and must focus attention on the merits of the dispute).

While oral communication with the Service demanding a refund is insufficient by itself to be considered an informal refund claim, Gustin v. United States, 876 F.2d 485, 488 (5th Cir. 1989), a written demand for refund "need not provide the entire framework for the informal refund claim." Id. Courts instead have focused on the communication as a whole to determine if sufficient notice was provided to the IRS such that an informal claim exists. Id.; accord United States v. Commercial Natl. Bank of Peoria, 874 F.2d 1165, 1171 (7th Cir. 1989) (courts need not only consider written component of an informal refund request). In this regard, several courts have held that each case must be decided on its own unique set of facts, and a court should consider all existing circumstances when determining whether a taxpayer has filed an informal claim for refund. See, e.g., Gustin v. United States, 876 F.2d at 488-89; Furst v. United States, 678 F.2d 147, 152 (Cl. Ct. 1982).

We believe that an informal written claim for interest abatement must be treated in a similar manner. Thus, in the present case, where a written claim has been filed, communicating clearly what periods are at issue and the reasons for abatement, we conclude that the taxpayer has presented a valid claim for abatement even though the claim was not filed on Form 843. As a result, your office should issue a formal notice of final determination with respect to the taxpayer's written request.

If you have any questions, please contact me at
(617) 565-7868.

MAUREEN T. O'BRIEN
Associate Area Counsel (SB/SE)

By: _____
JOHN R. MIKALCHUS
Attorney

Enclosure: Administrative file